No. 75-385

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH J. MAGGIO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Statutes and Rules	2
Questions Presented	6
Statement of the Case	6
Statement of Facts	7
Reasons for Granting the Writ	10
Argument	11
Conclusion	16

Appendices:

Appendix "A"—Opinion of Court of Appeals ....App. 1

Appendix "B"—Letter Re Order Denying Rehearing .....App. 24

TABLE OF AUTHORITIES

Cases

	PAGE
Bolling v. Sharpe, 347 U.S. 497	14
Bryan v. United States, 492 F.2d 775	7, 13, 14
Irizarry v. United States, 508 F.2d 960	12
McCarthy v. United States, 394 U.S. 459	6, 10, 11, 12, 13
United States v. Blake, 488 F.2d 101	7

Statutes

18 U.S.C. 371	6
18 U.S.C. 1341	1, 6
28 U.S.C. 1254 (1)	2

Federal Rules of Criminal Procedure

Rule 11	2, 6, 10, 11, 16
Proposed Amended Rule 11	3, 10

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Petitioner, Joseph J. Maggio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Middle District of Alabama, Northern Division, denying the Petitioner's motion to withdraw his plea of guilty and to vacate the judgment and sentence of two years imprisonment on a charge of mail fraud in violation of 18 U.S.C. 1341.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion was entered June 9, 1975. A timely Petition for Rehearing And Suggestion for Rehearing En Banc was denied by order dated August 13, 1975 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1975 (Appendix "A"). A timely Petition for Rehearing was denied on August 13, 1975 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES

Rule 11, F. R. Cr. P.:

"Rule 11. Pleas.

A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and *shall not accept such a plea* or a plea of nolo contendere *without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea." ([Emphasis added]

Proposed Amended Rule 11, F.R.Cr.P.:

Rule 11.

PLEAS

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open

court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea agreement procedure.

(1) In general. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) Notice of such agreement. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of plea. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(4) Rejection of plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of plea agreement procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of plea discussions. Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

QUESTIONS PRESENTED

1. Whether a finding of "substantial compliance" with the provisions of Rule 11 of the Federal Rules of Criminal Procedure conforms with the Supreme Court's requirement of "strict" or "scrupulous" compliance as set forth in *McCarthy* v. *United States*, 394 U.S. 459?

2. Whether, where the Circuit Court of Appeals has issued its mandate which in effect requires early implementation of the proposed amended Rule 11 of the Federal Rules of Criminal Procedure "in all district courts in this circuit", a defendant is denied due process of law and equal protection of the laws when his plea of guilty is allowed to stand notwithstanding a clearcut and admitted violation of that mandate?

3. Where a defendant "truly believed" that he would receive a lesser sentence, does he know and understand the consequences of his plea?

STATEMENT OF THE CASE

The petitioner Joseph J. Maggio was indicted in the Middle District of Alabama, Northern Division (Montgomery, Alabama) in indictment Cr. No. 12,793-N on September 14, 1972. (A. 7) The indictment charged Maggio, a corporation, and four other persons with seven counts of mail fraud in violation of 18 U.S.C. 1341 and with one count of conspiracy to commit the alleged mail frauds in violation of 18 U.S.C. 371. (A. 7-15) The case was tried to a jury and the defendants convicted; Maggio subsequently being sentenced to three years imprisonment. (A. 2) Maggio appealed his conviction to the United States Court of Appeals for the Fifth Circuit and the conviction was reversed and remanded. (A. 4)

The cause was again set for trial, but following certain negotiations with the office of the United States Attorney, Maggio tendered a plea of guilty to Count I of the indictment (mail fraud), and the remaining counts of the indictment were dismissed. (A. 17-18) Maggio was then sentenced to two years imprisonment. (A. 19) Shortly thereafter, Maggio filed his motion to withdraw his plea of guilty on the basis that the trial judge did not comply with the requirements of Rule 11 of the Federal Rules of Criminal Procedure in that the Court did not personally address the defendant and determine whether the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea, and that further the Court did not comply with certain mandatory provisions of the mandate of the Fifth Circuit Court of Appeal's mandate in *Bryan* v. *United States*, 492 F.2d 775, and that further the defendant did not in fact at the time of the plea understand the consequences of his plea. (A. 21-25)

On May 24, 1974, the Court held a hearing on the motion to withdraw the plea of guilty (A. 39-115) and thereafter that same day entered its order denying the motion to withdraw the plea of guilty. (A. 28) This appeal follows. (A. 35)

STATEMENT OF FACTS

As indicated above, under "Statement of the Case", this appeal is taken from the District Court's denial of Maggio's motion to withdraw his plea of guilty.

The case had been remanded by the Fifth Circuit Court of Appeals (*United States* v. *Blake, et al.*, 488 F.2d 101), and had been set for trial on May 16, 1974. During the 10-day or week period prior to the trial date, counsel for Maggio and the prosecutor had numerous telephone con-

versations in the nature of plea bargaining. (A. 43, 44) During these conversations, at one point, the prosecutor agreed that he would recommend probation if Maggio were to plead guilty, if the Court would allow such a recommendation. (A. 47) Subsequently, the prosecutor informed Maggio's counsel that Judge Johnson would not allow any recommendation. (A. 47)

Maggio however, did tender a plea of guilty through his counsel on May 16, 1974. (A. 17) During this proceeding the trial Judge asked Maggio if he "concurr[ed] in that motion?" (A. 17) The Judge also informed Maggio of the possible statutory sentences and inquired of Maggio as to agreements and promises. (A. 18) However, the trial Judge at no time personally inquired of Maggio as to the nature of the charge or as to factual guilt. (A. 1[illegible]-19)

Between the acceptance of the plea and the sentencing approximately six hours later that same day, Maggio had a conversation with the prosecutor in which the prosecutor told Maggio "he would be all right." (A. 49) Further the prosecutor had informed Maggio between the time of the plea and the sentencing that a telegram had been received from the United States Attorney's office in Chicago stating that Maggio had provided information leading to indictments and convictions and recommended probation for Maggio. (A. 118-120) The prosecutor stated that he had told Maggio that this telegram had been given to the Judge. However, the trial Judge at the time of hearing on the motion to withdraw the plea stated that he had asked the F.B.I. to verify the telegram and that the Judge had been informed by an agent that the telegram was partially false. (A. 119) This fact was not told to Maggio prior to his sentencing and thus he had no chance to rebut the erroneous statement of the F.B.I. agent.

Maggio had these above representations in mind and was very confident about his sentence when the trial Judge asked him prior to sentencing if there was any reason why he should not then be sentenced. (A. 67)

Maggio testified that he believed that he would receive leniency in sentencing and that in fact he was not guilty of the charges in the indictment but that he plead guilty only to save trouble all around. (A. 56)

Maggio had been sentenced to imprisonment for a period of two years (A. 16) Thereafter he filed his motion to vacate the sentence and to withdraw the plea. (A. 21) After hearing, the motion was denied. (A. 28)

REASONS FOR GRANTING THE WRIT

In this case the Fifth Circuit Court of Appeals has held that "substantial compliance" with Rule 11 of the Federal Rules of Criminal Procedure is sufficient to uphold a plea of guilty. This holding appears to be in direct conflict with this Court's prior holding in *McCarthy* v. *United States,* 394 U.S. 459, 22 LEd 2d 418 wherein this Court held there is inherent prejudice in a failure to scrupulously comply with Rule 11.

In addition, the Fifth Circuit had prior to the taking of the plea in this case required all district courts within the Fifth Circuit to take certain specified procedures on taking a plea of guilty (in effect, an early implementation of the proposed amended Rule 11). Both the district court and the Fifth Circuit found that the Fifth Circuit's requirements were deliberately not fulfilled. This Court should determine whether such a deliberate noncompliance is a denial of due process and of equal protection of the laws to the petitioner.

Lastly, both the district court and the Fifth Circuit Court of Appeals found that the petitioner "truly believed" that he would receive a substantially lesser sentence upon his plea. This court should determine and precisely define "understanding . . . the consequences of the plea".

ARGUMENT

I.

STRICT COMPLIANCE WITH RULE 11 IS REQUIRED.

In this case there is no question that the trial judge did not personally address the defendant and determine that the plea was being made voluntarily "with understanding of the nature of the charge and the consequences of the plea". (A. 17-19) The Court of Appeals acknowledges the fact that the trial judge did not personally address the defendant to make these determinations but in fact relied on the trial judge's "personal knowledge of the previous trial, Maggio's presence at that trial, and the jury's conclusion that Maggio was guilty . . .". (App., p. 12)

The Court of Appeals on this basis found that "Rule 11 was substantially complied with in this case" (App., p. 11).

Yet this Court in *McCarthy* v. *United States,* 394 U.S. 459, 471-472, 22 LEd 2d 418, 428, stated:

> "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew. . . ."

Furthermore, at 394 U.S. 471, 22 LEd 2d 428 this Court states in discussing the possibility that the defendant in *McCarthy* did not fully understand the charge against him:

> ". . . had the District Court *scrupulously* complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's *own* replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime charged. . . ." [Emphasis added]

The Court also stated at 394 U.S. 467, 22 LEd 2d 426:

> "To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to 'assumptions' not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge".

Also as this Court stated at 394 U.S. 470, 22 LEd 2d 427:

> "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him".

The Second Circuit has agreed with this Court's holding in *McCarthy*, e.g., *Irizarry* v. *United States*, 508 F.2d 960.

Yet, now in this case the Fifth Circuit holds that merely "substantial compliance" is necessary and that there is

substantial compliance where the district judge relies on matters outside the record at the time of the plea and thus where the district judge "assumes" compliance. This is directly contrary to this Court's opinion in *McCarthy*.

II.

FAILURE OF THE DISTRICT COURT TO COMPLY WITH THE MANDATE OF THE FIFTH CIRCUIT COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

Approximately 42 days prior to the entry of the plea in this case, the *en banc* Fifth Circuit Court of Appeals issued its opinion in the case of *Bryan* v. *United States*, 492 F. 2d 775, (Opinion dated April 4, 1974—plea entered May 16, 1974), and therein stated:

> "Thirty days after the date of this opinion all district courts in this circuit shall put into effect the following supplementary practices at the time of taking pleas of guilty or nolo contendere. The court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. Specific inquiry shall be made as to the existence of such an agreement before a plea is accepted. The defendant shall be placed under oath. These are minimum practices and are not intended to circumscribe any additional procedures or inquiries deemed by any court to be pertinent to the issue of plea propriety in any case."
>
> (492 F. 2d 775 at 781)

It is contended by the petitioner that these procedures were in effect an early implementation of parts of the revised Rule 11 promulgated by this Court and which has finally been enacted as modified (See 17 CrL 3215) by ap-

proval of the Congress and signature of the President on August 6, 1975.

The record is clear that the petitioner and his counsel were unaware of the *Bryan* decision at the time of the plea because it had not yet been published (A. 24, 112). Yet, clearly, the district judge and the prosecutor were aware of the mandated procedures and yet the district judge deliberately violated the mandate because of his expressed belief that it did not apply to him (A. 31, 94).

The district court thus denied this petitioner equal protection of the laws and the due process of law guaranteed him by the Fifth Amendment to the Constitution.

Obviously, the petitioner's plea taken before the district court in Montgomery, Alabama, was being taken in a different manner than those taken throughout the rest of the Fifth Circuit and this was being done solely on the judgment of the district judge.

This Court has heretofore held that the rights of equal protection and due process are protected by the Fifth Amendment. (e.g. *Bolling* v. *Sharpe,* 347 U.S. 497, 98 L. Ed. 884, and cases cited therein.)

To deny this petitioner the mandated procedures required throughout the Fifth Circuit is to discriminate against him and to deny him his Constitutionally protected rights to equal protection and due process.

III.

WHERE A DEFENDANT "TRULY BELIEVES" THAT HE WILL RECEIVE A LESSER SENTENCE, HE DOES NOT UNDERSTAND THE CONSEQUENCES OF HIS PLEA.

The district court and the Circuit Court of Appeals found that the petitioner ". . . truly believed that he would

get no more than four months incarceration and that he probably would get only probation with no jail sentence" (App. p. 13) In other words, the petitioner, although told of the possible maximum sentence, did not understand that he could get two years imprisonment as he did.

If the petitioner's belief had been solely his own belief not based upon fact or reason, the petitioner might agree with the Court of Appeals' finding that the subjective belief of a defendant as to the amount of sentence unsupported by any promises from the government or indications from the court is insufficient to invalidate a guilty plea as unknowing.

However, in this case the petitioner had been aware of the negotiations between his counsel and the prosecutor. Further, on the day of the plea, apparently contrary to the district judge's own position that he would not receive recommendations, he did receive from the prosecutor a telegram from the Chicago United States Attorney's Office requesting probation for the petitioner. Further, following the delivery of the telegram to the judge, the prosecutor indicated to the petitioner that ". . . he would be all right." When Maggio replied in the negative to the trial judge's inquiry as to agreements at the time of the plea, it must be understood that the agreements were understood by Maggio to be confidential, although Maggio understood that the agreements had been transmitted to the trial judge. The trial judge did not make this part of the record at the time of the plea.

Clearly, petitioner's belief that he would receive probation or only a few months incarceration was not unreasonable.

It is argued to this Court that a defendant who truly believes he will receive a lesser sentence does not understand the consequences of his plea.

A reading of the amended Rule 11 shows that these problems should be obviated if the district courts scrupulously follow the new Rule. The trial court will now have to be informed of the negotiated sentence and indicate its acceptance or rejection. If the trial court rejects the negotiated sentence, the defendant will be allowed to withdraw his plea. This is only fair.

Likewise, the petitioner should be allowed to withdraw his plea.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September, 1975

APPENDIX

APPENDIX "A"

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH J. MAGGIO,

Defendant-Appellant,

No. 74-2629.

United States Court of Appeals,
Fifth Circuit.

June 9, 1975.

Defendant filed motion to vacate his plea of guilty to one count of eight-count mail fraud indictment. The United States District Court for the Middle District of Alabama at Montgomery, Frank M. Johnson, Jr., Chief Judge, denied the motion to vacate and the defendant appealed. The Court of Appeals, Roney, Circuit Judge, held that the district court substantially complied with the mandatory provisions of rule pertaining to acceptance of guilty pleas; that the court's finding that the plea was voluntary was not clearly erroneous; that Court of Appeals' decision pertaining to plea bargaining requires a district court which recognizes any form of plea agreement so to inform the defendant, and to explain limitations the court may impose on such arrangements and, when the defendant is placed under oath, he should be asked for the details of any arrangement, and specifically queried as to

any arrangement of the kind which is not permitted by the district court; and that in the absence of any showing of prejudice to the defendant, the district court's failure to comply with the decision did not require that the guilty plea be set aside and that defendant be permitted to plead anew.

Affirmed.

Appeal from the United States District Court for the Middle District of Alabama.

Before GOLDBERG and RONEY, Circuit Judges, and LYNNE, District Judge.

RONEY, Circuit Judge:

Choosing to forego his right to a jury trial, Maggio pled guilty to one count of an eight count mail fraud indictment. After he was sentenced to two years incarceration, he moved to vacate his guilty plea alleging that the plea was involuntary, and that the district court failed to comply with Rule 11, F.R.Crim.P. and with the mandate of this Court in Bryan v. United States, 492 F.2d 775 (5th Cir. 1974) (en banc). The district court denied the motion. We affirm, but not without expressing concern that had the district court followed the spirit of *Bryan,* this litigation, both in the trial court and here, could have been avoided.

Prior to this case, in December, 1972, the defendant Joseph J. Maggio was tried before a jury in the District Court for the Middle District of Alabama with Chief Judge Frank M. Johnson presiding. The jury found him guilty of seven counts of mail fraud, 18 U.S.C.A. § 1341, and one count of conspiracy to violate the laws of the United States, 18 U.S.C.A. § 371. Chief Judge Johnson sentenced

Maggio to three years in the custody of the Attorney General. Maggio appealed to this Court where his conviction was set aside because of the improper introduction of some hearsay evidence, telephone company records which had not been properly authenticated. *See* United States v. Blake, 488 F.2d 101 (5th Cir. 1973). The events ensuing subsequent to that decision give rise to the problems we must now confront. A discussion of the facts in detail, revealed by the testimony at the evidentiary hearing on the Motion to Vacate Sentence, will illuminate the nature of defendant's contentions.

After reversal of the first conviction, the case against Maggio was calendared to be retried by jury, again before Chief Judge Johnson, on May 13, 1974. Approximately ten days or two weeks prior to that trial date, Maggio's counsel, Carl M. Walsh, at Maggio's request, contacted the First Assistant United States Attorney who was going to prosecute the case, D. Broward Segrest, and they had the first of a series of conversations regarding a possible change in Maggio's plea from not guilty to guilty.

During the first couple of conversations, Segrest, in response to queries by Walsh, delineated the Government's position on the negotiations. First, the United States would move to dismiss Counts 2-8 of the indictment if Maggio would plead guilty to Count 1, a mail fraud count. Second, the Government would be willing to recommend a probationary sentence if Chief Judge Johnson would allow any sentence recommendation from the Government.

Segrest made it clear that it was the policy of the District Court for the Middle District of Alabama not to ask for nor to accept sentence recommendations from United States Attorneys in relation to guilty pleas, and therefore, Se-

grest could not agree to a bargain based on a suggested sentence. The most Segrest could do was to stand mute at time of sentencing and not to insist on a prison sentence, as he had done when Maggio was convicted by the jury. Segrest suggested to Walsh that allocution on behalf of Maggio would be the only chance to seek a more lenient sentence from the court and that Segrest's silence would render Walsh's request unopposed, perhaps resulting in a lighter sentence for Maggio. Segrest did offer, in exchange for a guilty plea, to inform the Probation Office, for inclusion in the presentence investigation report to the judge, that the United States would recommend probation for Maggio.

After these conversations Walsh consulted with Maggio on various occasions and conveyed to him the substance of the negotiations with Segrest. Maggio was unsure of exactly which days the particular information was conveyed to him, except he remembered the conversations of Wednesday, May 8, 1974, and Thursday, May 9, 1974. Nonetheless, he was told everything that transpired between Walsh and Segrest. Maggio initially told Walsh that if Segrest could and would make a probation recommendation in open court, he would be willing to plead guilty to one count of mail fraud.

At Walsh's request, Segrest personally approached Chief Judge Johnson, and asked him if he would make an exception and accept a recommendation from the Government on Maggio's sentence. Segrest was told that the judge would neither allow nor accept a sentence recommendation in this case inasmuch as the judge did not want the defendant to be misled as to the effectiveness of such a recommendation.

Segrest telephoned Walsh and told him that Chief Judge Johnson would not allow the United States to recommend

a sentence. Walsh told Segrest that under that circumstance, the Government would probably have to try Maggio, but that he would consult with Maggio and let Segrest know his decision definitely by the Wednesday before the trial was to be held on Monday, May 13. Walsh informed the defendant that the Court would not allow the Government to recommend a sentence, and Maggio told Walsh that he wanted to be tried. Walsh telephoned Segrest on Wednesday, May 8, 1974, and told him of Maggio's decision.

After he had directed Walsh to inform Segrest that a trial would be necessary, Maggio unilaterally began reconsideration of his decision and ultimately, changed his mind without further consultation with Walsh. Defendant detailed why he decided to plead guilty. He testified that generally the "sequence of events" in the various telephone conversations made him feel that he would receive a light sentence, probably probation, but at most four months incarceration. He said he thought that since he had received only three years after being convicted by a jury of eight counts, he would probably get much less for only one count. He viewed the prosecution's change from insisting on incarceration at his first trial to standing mute at his second sentencing as a good indication he would receive leniency from the court. The fact that he would save the Government the time and expense of a jury trial would also be in his favor, Maggio believed. But neither his own lawyer, the United States Attorney nor the Court ever made any promise to him regarding a probable sentence. Maggio also related reasons other than his anticipation of leniency which induced him to change his mind and plead guilty. He figured that if he had to have any "blemish on his record," he would be better off if it was for only one count than if it was for eight counts, and he

felt that a guilty plea to one count would be easier on his family and would save him some money.

Having reached his decision, Maggio contacted Walsh on Thursday afternoon, May 9. Walsh contacted Segrest and told him that Maggio would plead guilty to Count 1 in exchange for the Government's dismissal of the other seven counts. Segrest agreed. After some negotiations between Walsh and Segrest regarding when the plea could be taken, Segrest informed the court of Maggio's decision and was given permission to notify the Government's witnesses that they need not come to court for the scheduled trial.

Maggio's case was called Monday, May 13, 1974, at approximately 10:00 a. m. With Chief Judge Johnson presiding, Walsh moved to change his client's plea to Count 1 from not guilty to guilty. The court then proceeded to hold a non-*Bryan* type guilty plea hearing, similar to those held when plea bargaining was an under-the-counter process requiring denial in open court. The defendant was not placed under oath. The court did not state that plea agreements are permissible and that defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. The court did, however, address the defendant personally and determine, to its satisfaction, that the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea.

The court asked Maggio if he concurred in the motion, and the defendant responded, "Yes, sir." After some discussion, the court asked if there had been any agreement between the Government and the defendant in this case. Segrest informed the court that the only agreement was that if there was a guilty plea to Count 1, the Government

would not insist on the other counts. The court asked both Walsh and Maggio if this was the only agreement that either of them knew about and both responded that it was.

The court then directed a number of questions to Maggio: (1) had anyone promised him anything other than the dropping of seven counts in order to induce him to plead guilty in this case; (2) had anyone told him what his sentence would be if he pled guilty; (3) had he received any threats or promises of any kind, other than the dropped charges, in order to have him plead guilty. To each question Maggio responded, "No, sir."

The court next informed the defendant of the maximum sentence possible for the count to which he was pleading guilty and asked Walsh if that was what he had previously advised his client. Walsh said it was. Chief Judge Johnson than accepted the guilty plea and, at the request of defendant's counsel, set sentencing for 5:00 p. m. the same day. Subsequently, Segrest moved to dismiss the other seven counts against Maggio, and the court granted the motion.

After the plea session, but before sentencing later that same day, Segrest received a telegram from Assistant United States Attorney Frank Murtha, Jr., of Chicago, Illinois. The telegram stated that Maggio had provided assistance to the United States which had resulted in a number of indictments and convictions in Chicago and based upon this, Murtha would recommend that Maggio be given a probated sentence. Segrest took this telegram to Chief Judge Johnson who informed Segrest that he was not willing to accept the telegram or to place any reliance on it alone. The court contacted a local F.B.I. agent to have the telegram verified. The agent contacted the Chicago field office of the F.B.I. and was told that the telegram

was generally true, except that there had been no convictions as yet. In addition, the Chicago office told the agent that Maggio was a valuable informant, and that they would like to "keep him on the streets." This information was relayed to the court.

At about 4:00 p. m., after he had given the telegram to Chief Judge Johnson, Segrest told Maggio of the telegram and said something like "Don't worry, things look good." Maggio testified that this comment by Segrest did not affect his decision to plead guilty, which had been made the previous week in Illinois, but that it did reenforce his belief that he would be leniently treated by the court at sentencing.

Sentencing took place at five o'clock as scheduled. Walsh made a lengthy statement detailing why the court should be lenient in sentencing Maggio, urging that incarceration of his client would serve no useful purpose and that probation would be an appropriate penalty. The court asked Maggio if he wanted to make a statement and if he knew of any reason that he should not be sentenced. To both questions the defendant responded, "No." The court then imposed a sentence of two years incarceration. There was further discussion, not material here, concerning when and where sentence was to commence and bond pending commitment. Maggio was given permission to report to enforcement officers in Illinois to commence his sentence.

A week later, on May 20, 1974, Walsh filed for Maggio a Motion to Withdraw Plea of Guilty alleging that (1) the plea was involuntary and without full knowledge of the consequences, (2) the court failed to comply with Rule 11, F.R.Crim.P., in accepting the plea, and (3) the court, in accepting the plea, failed to comply with the mandate of this Court's en banc decision, Bryan v. United States, 492

F.2d 775 (5th Cir. 1974). Chief Judge Johnson held a hearing on the motion on May 24, 1974, at which the above stated facts were disclosed. At the end of the hearing, the court denied the motion and entered its findings and conclusions in the record.

The court found that there was no agreement regarding the sentence or a recommendation of sentence between the United States and either Walsh or Maggio. Rather, Walsh was clearly advised that the court would not accept any such recommendation regarding sentence. The court specifically found that Maggio had a subjective expectation of probation, but that expectation grew solely out of the defendant's own mental processes and was not based on anything the United States told him or his counsel. The court concluded, therefore, that the totality of the circumstances did not justify Maggio's belief.

Chief Judge Johnson also found substantial compliance in all respects with Rule 11. The court had received an affirmative reply to its query of Maggio on whether he concurred in the plea motion. The factual basis of the plea was known to the court through the presentence report, as well as the court's previous presiding over Maggio's first trial where Maggio was convicted of all eight counts. The first trial also provided Maggio with an understanding of the nature of the charges against him and with an appreciation of the elements of the crime, the court found. Thus, the court concluded that Maggio's plea was voluntary and with full knowledge of the circumstances.

Regarding the requirements of *Bryan,* the district court held that its failure to comply with that opinion fully was not a basis for setting aside the plea. The trial court viewed *Bryan* as imposing requirements only on those district courts in the Fifth Circuit which allowed plea bar-

gaining regarding the sentence to be imposed, but not as *requiring* a court to allow such a bargain. The court concluded that as far as necessary when such bargaining was not allowed, it had complied with *Bryan*.

Maggio asserts these same three grounds for reversal on this appeal. First, the guilty plea is void because the district court failed to comply with the strict requirements of Rule 11, F.R.Crim.P. Second, the guilty plea is void because, based on an evaluation of the totality of the circumstances, Maggio did not understand the consequences of his plea at the time it was given. Finally, the guilty plea is void because of the trial court's failure to comply with the specific mandate of the *en banc* decision of this Court in Bryan v. United States.

Rule 11 Compliance

[1] Defendant's first contention that the district court failed to comply with the mandatory provisions of Rule 11, F.R.Crim.P. is without merit. Rule 11 prohibits the court from accepting a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."[1] The

[1] In its entirety, Rule 11, F.R.Crim.P., provides:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Rule has a two-fold purpose: *first,* to assist the district court in making the constitutionally required determination that a defendant's guilty plea is truly voluntary, and *second,* to produce a complete record, at the time the plea is entered, of the factors relevant to this voluntariness determination, thereby eliminating any need to resort to later fact-finding proceeding in this highly subjective area. McCarthy v. United States, 394 U.S. 459, 465, 469-470, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); Monroe v. United States, 463 F.2d 1032, 1035 (5th Cir. 1972).

[2] The Supreme Court, acting under its supervisory power in *McCarthy,* created an "automatic prejudice" rule to be applied whenever a guilty plea is accepted by a district court without meticulous adherence to the procedures dictated by Rule 11, which prejudice generally entitles the defendant to an opportunity to plead anew if the issue is raised on direct appeal. *See, e. g.,* United States v. Davis, 493 F.2d 502 (5th Cir. 1974); United States v. Bethany, 489 F.2d 91 (5th Cir. 1974); United States v. Blair, 470 F.2d 331 (5th Cir. 1972), cert. denied, 411 U.S. 908, 93 S.Ct. 1536, 36 L.Ed.2d 197 (1973). But the Supreme Court refused to establish any general guidelines of necessary procedures other than those expressed in the Rule itself, noting that the nature of the inquiry required by Rule 11 must necessarily vary from case to case with matters of reality, and not mere ritual, to control. McCarthy v. United States, 394 U.S. at 467 n. 20, 89 S.Ct. 1166. We think the record affirmatively shows that Rule 11 was substantially complied with in this case.

The district judge who presided at defendant's guilty plea was the same district judge who had presided over Maggio's previous jury trial on the same indictment. At that trial, which Maggio attended, the Government presented all of its evidence against Maggio, disclosing the

facts upon which the charges were brought. The defendant heard the district court charge the jury fully on the law upon which the indictment was based, and the relationship between the law and the facts. Twelve jurors then found Maggio guilty of all eight counts in the indictment, including the one to which he subsequently pled guilty. These convictions were reversed by this Court, not because of any lack of sufficiency of the evidence or confusion at the trial as to "the nature of the charge," but on a technical evidentiary ruling involving an improper predicate for receiving into evidence telephone company records.

[3] At the plea taking session the district judge had personal knowledge of the previous trial, Maggio's presence at that trial, and the jury's conclusion that Maggio was guilty of the count to which the plea was directed. Under such a circumstance, the district court was justified in determining that Maggio understood the nature of the charge, without going through a ritualistic procedure that is necessary in the average case.

The same circumstances fulfilled the requirement that the court "be satisfied that there is a factual basis for the plea," which is another requirement of Rule 11. *See, e. g.*, Jiminez v. United States, 487 F.2d 212 (5th Cir. 1973), cert. denied, 416 U.S. 916, 94 S.Ct. 1623, 40 L.Ed.2d 118 (1974).

We therefore conclude that the requirements of Rule 11 were adequately met under the facts of this case.

Voluntariness of the Plea

[4-6] It is axiomatic that a guilty plea is invalid unless voluntarily given by a defendant with a full understanding of the possible consequences of the plea. *See, e. g.*, Brady v. United States, 397 U.S. 742, 748-749 n. 6, 90

S.Ct. 1463, 25 L.Ed.2d 747 (1970); United States v. Blair, 470 F.2d 331, 339 (5th Cir. 1972), cert. denied, 411 U.S. 908, 93 S.Ct. 1536, 36 L.Ed.2d 197 (1973) and cases cited therein. The Rule 11 provision that a defendant must be shown to understand "the consequences of his plea" does not mean that he must know the sentence that he will receive. Ruiz v. United States, 494 F.2d 1, 3 (5th Cir.), cert. denied, —— U.S. ——, 95 S.Ct. 181, 42 L.Ed.2d 144, 43 U.S.L.W. 3239 (U.S. Oct. 10, 1974) (No. 73-7043). It merely means that he must understand the length of sentence and amount of fine he might possibly receive. Maggio clearly had this understanding. He had previously received a three-year sentence on this same count, voided by the reversal of his conviction. There was discussion in his presence between the attorneys and the court at the plea taking session as to the exact count of the eight charged in the indictment to which he was pleading, and the maximum sentence allowed. The court directly addressed the defendant, stating "1341 carries a maximum punishment of not more than one thousand dollars or five years in the penitentiary or both."

Maggio asserts, and the district court found, that he truly believed that he would get no more than four months incarceration and that he probably would get only probation with no jail sentence. Since he did not believe that his probable sentence would be as severe as the two years incarceration he received, Maggio contends that his guilty plea was made without actually "knowing" of the consequence.

[7, 8] The courts have consistently held that the subjective belief of a defendant as to the amount of sentence that will be imposed, or the hope for leniency, unsupported by any promises from the Government or indications from the court, is insufficient to invalidate a guilty plea as un-

knowing or involuntary. *E. g.,* United States v. Battle, 467 F.2d 569, 570-571 (5th Cir. 1972); Masciola v. United States, 469 F.2d 1057, 1059 (3d Cir. 1972); United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1405, 35 L.Ed.2d 612 (1973); Wellnitz v. Page, 420 F.2d 935, 936-937 (10th Cir. 1970); Vanater v. Boles, 377 F.2d 898, 900 (4th Cir. 1967); *see* United States v. Frontero, 452 F.2d 406, 411-412 (5th Cir. 1971). The information provided to Maggio and his attorney by the United States made the position of the Government clear: The district court would not allow the Government to make a recommendation because this might imply that the court would accept it, when in fact the court was at liberty to ignore the recommendation entirely.[2] *See, e. g.,* United States v. Hernandez-Salazar, 471 F.2d 1209 (9th Cir. 1972). Walsh told this to Maggio, and the court made it clear at the time it accepted the plea what maximum sentence could be imposed.

[9] In the face of these uncontroverted facts the trial court found Maggio's plea to have been voluntary. We cannot hold that finding to be clearly erroneous. *See* Holland v. United States, 406 F.2d 213, 216 (5th Cir. 1969).

Compliance with Bryan v. United States

[10] We are thus brought face to face with this issue: does the failure of the district court to comply strictly with

[2] The hearing below and oral argument in this Court were complicated somewhat by the dual role filled by both the United States Attorney and Maggio's defense counsel, *i. e.* witness at the evidentiary hearing and advocate. At oral argument a factual dispute arose over a matter neither side had explored in the hearing below but which we find irrelevant. Both attorneys had difficulty separating their somewhat contradictory roles.

Bryan requirements necessitate vacation of a guilty plea in the absence of a showing of prejudice. We hold it does not, but point out the legal and judicial effort that has been required because of such noncompliance in this case.

[11] In the first place, as we later develop, the district court was wrong in considering *Bryan* inapplicable to its practice. Although the court would not accept recommendations as to sentence, it did recognize bargains as to the dropping of charges. To this extent then, at least, it should have had defendant under oath, and advised that such bargains were permissible. Permitting some bargains but refusing others means that the court should directly advise which bargains are not permissible, in order to give a clear record of the plea-taking negotiations and process and to foreclose the kind of evidentiary hearing and full-scale appeal that was required in this case.

This Court's en banc decision in Bryan v. United States, 492 F.2d 775 (5th Cir. 1974), was in response to the increased incidence of attacks on guilty pleas based upon agreements reached after negotiations between prosecutors and defendants. In our supervisory capacity we established the minimum procedures we considered to be commensurate with both the letter and spirit of Rule 11, F.R.Crim.P. and the Supreme Court decisions regarding "plea bargaining." *See, e. g.,* Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed. 2d 418 (1969). The *Bryan* supplementary procedure is similar to that which would be required by the proposed revision to Rule 11 which is presently awaiting Congressional action. *Compare* Bryan v. United States, 492 F.2d at 780-782 *with* Proposed F.R.Crim.P. 11, 62 F.R.D. 275-277 (1974). *Bryan* requires (1) that the defendant be placed under oath at the time of taking his guilty plea, (2)

that the district court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered, and (3) that specific inquiry be made as to the existence of such an agreement before a plea is accepted. 492 F.2d at 781.

This case demonstrates the type of problems which can arise when the trial court does not make clear to the defendant the court's position regarding agreements between the prosecutor and the defendant. Maggio was told that the judge would not allow a sentence recommendation "in open court," and from this he surmised, incorrectly, that certain "behind the scenes" contact would be possible. As a consequence, he did not believe that the maximum possible sentence stated by the judge at the plea session was truly a possibility. Maggio's confusion could have been obviated had the *Bryan* procedure been adopted to the plea session in this case. As it is, we are once again confronted with a defendant expecting "secret" contacts and consequently, mired in a peripheral matter such as we had hoped to avoid by our decision in *Bryan*.

Chief Judge Johnson does not participate in plea negotiations and will not accept sentence recommendations from the United States Attorney when a guilty plea is tendered. The court's apparent reason for foreclosing this option is to avoid suggesting to the accused what sentence actually will be imposed if he pleads guilty. Sentencing is ordinarily solely within the discretion of the trial court, which may accept, reject or ignore any prosecutorial recommendation, if one is given. The prosecutor may not, therefore, properly promise any defendant that he will receive a certain sentence if he pleads guilty to a charge. The United States Attorney does have the authority, generally, to make a recommendation regarding sentence, and

it is the defendant's belief that such a recommendation will be considered by the sentencing court that makes such a recommendation a potential *quid pro quo* in plea negotiations. On the other hand, a recommendation to any court that does not plan to follow it or give it consideration may well mislead the defendant. The district judge in this case, for example, would not consider any prosecutorial sentence recommendation in setting the sentence, instead making his own independent judgment of the appropriate sentence. The court recognized that to mislead the defendant by permitting prosecutorial recommendations could, in some circumstances, adversely affect the voluntariness of the plea, even though the plea bargain would have been unquestionably kept. *See, e. g.,* United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); Holland v. United States, 406 F.2d 213 (5th Cir. 1969). Under the circumstance of this case, neither the Government nor the defendant has suffered any loss when the court merely refuses to allow the prosecutor to suggest a sentence, which suggestion the court intends totally to disregard.

[12] Apparently at the time the plea was accepted the trial court below viewed *Bryan* as applying only either to plea sessions wherein the Government was to give a sentence recommendation or to plea sessions involving an agreement where the judge had taken an active role in the negotiation of its terms. This Court noted sometime ago that a variety of reasons support a trial judge's refusal to participate in plea discussions. Brown v. Beto, 377 F.2d 950, 957 n.4 (5th Cir. 1967). *See also* ABA Standards, Pleas of Guilty, § 3.3; Proposed Rule 11(e)(1), F.R.Crim. P. Since *Bryan* could not be limited only to situations involving a practice which has been disapproved, the district court must have considered *Bryan* limited to plea agreements involving a plea recommendation, such as the one

in *Bryan* itself. This reads the *Bryan* opinion too narrowly. The holding on the merits of the defendant's claim in *Bryan* was of necessity directed to a situation involving a sentence which the defendant anticipated to be imposed, as that was the factual setting of that case. But Part II of the opinion, on which the en banc court was unanimous, was intended to apply to all district courts in the Fifth Circuit and not just to those which accept sentence recommendations. *Bryan* was not meant to create an immutable litany applicable only in factual settings similar to its own.

An agreement reached after "plea bargaining" may encompass much more than the prosecutor's agreeing to recommend a particular sentence to the sentencing judge. *See* Swanson v. Estelle, 492 F.2d 115, 117 (5th Cir. 1974). As in this case, it may entail a defendant pleading guilty to one count in exchange for the prosecutor's dropping other counts. United States v. Cawley, 481 F.2d 702, 709 (5th Cir. 1973); *cf.* United States v. Vale, 496 F.2d 365 (5th Cir. 1974). A defendant may plead guilty in exchange for the Government's dropping an enhancement provision in the indictment. Swanson v. Estelle, 492 F.2d 115, 117 (5th Cir. 1974). A guilty plea may be entered by a defendant to a lesser included offense in order to limit the maximum possible sentence which he might receive. United States v. Ammidown, 162 U.S.App.D.C. 28, 497 F.2d 615 (1973). The Government might exchange dropped counts for information which the defendant agrees to provide. United States v. Owen, 492 F.2d 1100, 1106-1109 (5th Cir.), cert. denied, —— U.S. ——, 95 S.Ct. 227, 42 L.Ed.2d 180, 43 U.S.L.W. 3256 (U.S. Oct. 29, 1974) (No. 73-6978). There are numerous other variations. *See, e. g.,* United States v. Ross, 493 F.2d 771 (5th Cir. 1974); United States v. Hamilton, 492 F.2d 1110 (5th Cir. 1974); 8 Moore's Federal

Practice ¶¶ 11.05-11.06 (2d ed. 1975). Only one option normally available for offering by the prosecutor, a sentence recommendation by the prosecutor to the sentencing court, was apparently foreclosed by the trial court in this case. *See, e. g.,* Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Dames v. Wainwright, 491 F.2d 1098 (5th Cir. 1974).

Primary responsibility for the administration of each of the numerous components of these various plea bargains does not necessarily rest with the district court. Where the prosecutor has primary responsibility for the administration of a particular element of our system of justice, the district court's role becomes secondary and complementary to that of the prosecutor. For example, the Court of Appeals for the District of Columbia Circuit views the district court's authority to restrict or reject certain types of plea bargains as being limited to insuring that the United States Attorney has not abused the discretion which is inherent in the prosecutorial position. *See* United States v. Ammidown, 162 U.S.App.D.C. 28, 497 F.2d 615 (1973). *Ammidown* contains the most extensive judicial discussion we have found concerning the roles of the prosecutor and the court in the plea bargaining scenario.

[13] This Court has also addressed the question to a limited extent. For example, we have held that once Rule 11 has been satisfied, and a reasonable effort must be made to satisfy it, a district judge cannot refuse a negotiated guilty plea except for "good cause." United States v. Martinez, 486 F.2d 15, 20-22 (5th Cir. 1973). Finding good cause absent in *Martinez,* this Court allowed the defendant to enforce such an agreement after the judge had refused his guilty plea and even after the defendant had been convicted of the counts which the Government had originally

agreed to dismiss. *See* United States v. Martinez, 486 F.2d at 21-22. When *Martinez* is viewed in conjunction with the Federal Rules of Criminal Procedure, it suggests that the district court may not prohibit all plea negotiations between the prosecutor and the defendant. *Martinez* in effect gives a defendant a conditional right to have his guilty plea accepted, while Rule 48(a), F.R.Crim.P. allows the United States Attorney to dismiss an indictment, thereby terminating the prosecution. Although the dismissal requires leave of the court, the court cannot refuse the dismissal except in limited circumstances. *See* United States v. Ammidown, 162 U.S.App.D.C. 28, 497 F.2d 615 (1973). Combined, these legal authorities suggest that the district court may not issue a blanket proscription of plea agreements of the kind where the prosecution drops some charges in exchange for the defendant's guilty plea to other charges.

This was the only type of plea bargain which was reached in this case, and the district court properly accepted it. In spite of the district court's recognition of plea agreements, at least to a certain extent, it believed that *Bryan* did not apply. At the hearing on the motion to vacate Maggio's sentence, the court addressed itself to the *Bryan* contention:

> The fact that the Court did not state, and I mention this because it is in the motion, that pre-arrangements are permissible, that Bryan requires that, I don't think that Bryan requires that the Court that doesn't allow prearrangements to state that. It does not constitute a basis for setting a plea and a sentence aside. If agreements between the Government Counsel and Defense Counsel to the effect that if the Court accepts a plea to one count, other counts will be dropped, constitutes plea bargaining, then the record which has been filed in this case, the colloquy in open court at the time the plea was accepted, reflects that the Court did recognize such agreements, and in granting the motion to dismiss the other counts, honored the agreement.
>
> The Court was not aware of any other arrangements or agreements, if there were any. I found that there weren't.

Thus, the record in the case shows that the district court did recognize plea arrangements and, in fact, honored the one made in this case. Under such a circumstance, the district court should have complied with our mandate in *Bryan* as far as possible. As *Bryan* recognized, the plea negotiation process is no longer to be kept in the shadows. It must be completely exposed to the light of day. The problems do not arise from the *fact* of bargaining, but from a failure of communication between the courts and defendants, who should fully understand the process and its parameters in order to enter a guilty plea fully understanding its consequences.

[14] It is beyond dispute that *Bryan* requires a district court which permits plea agreement to inform the defendant of that fact. Furthermore, if the court does not allow certain types of agreements, such as agreements under which the Government is to recommend a sentence to the court, the court should tell this to the defendant and explain why the court has imposed such a limitation on the prosecutor's authority. Then when the defendant is under oath he should be expressly asked if he knows of any agreement involving the forbidden option. It is imperative that the court make sure that the defendant is fully aware of the possible consequence of his guilty plea. Had *Bryan* been followed and the defendant told that he had a duty to disclose the existence and details of any agreement which related to the proposed sentence, this case may have been finally disposed of by the guilty plea.

We see no prejudice requiring reversal, however, from the district court's failure to comply fully with the *Bryan* mandate. The *Bryan* requirement that a defendant be placed under oath was to preclude collateral attacks on a guilty plea by a defendant asserting that his representations to the court when he entered the plea were fabricated. Here the facts uncovered at the subsequent hearing on Maggio's motion to vacate his plea did not contradict or discredit his statements made at the time he entered his plea. On the contrary those facts demonstrated that the agreement disclosed to the court was the only agreement and that it was fully consummated by the Government. While the district court did not state that plea agreements were acceptable, it did inquire into the existence of any plea agreement.[3] Maggio then accurately ap-

[3] At the time Maggio's guilty plea was entered the following colloquy took place:

THE COURT: 1341. In the meantime, I will ask these questions. *Has there been any agreement between the Government and the defendant in this case?*

D. BROWARD SEGREST: The only agreement is that if the plea to count one is accepted, the United States will not insist on the other counts.

THE COURT: *Is that the agreement?*

CARL M. WALSH: Yes, sir.

THE COURT: Has there been any other agreement?

CARL M. WALSH: No, sir.

THE COURT: *Has there been any other agreement insofar as you know, Mr. Maggio?*

JOSEPH J. MAGGIO: No, sir; no, sir.

THE COURT: Has anyone promised you anything other than what the lawyers just recited in order to induce or get you to plead guilty in the case?

JOSEPH J. MAGGIO: No, sir.

(footnote continued)

prised the court of the existence and terms of the only such agreement.

We wish to emphasize, however, that *every* district court in the Fifth Circuit is to comply with the *Bryan* mandate, modified to reflect each court's individual practices. We do not decide in this case, however, the panoply of plea negotiations a district court must permit. That decision is better left to appropriate cases involving concrete controversies over the issue. *Cf.* United States v. Ammidown, 162 U.S.App.D.C. 28, 497 F.2d 615 (1973).

To summarize, we do hold that at the least *Bryan* requires a court which recognizes any form of plea agreement so to inform the defendant, and to explain the limitations the court may impose on such arrangements. When the defendant is placed under oath, as required by *Bryan,* he should be asked for the details of any arrangement, and specifically queried as to any arrangement of the kind which is not permitted by the court. If the failure to do this creates prejudice to the defendant, he must be allowed to plead anew. Being unable to find any prejudice here, however, we affirm the district court's denial of Maggio's motion to vacate his guilty plea.

Affirmed.

(footnote continued)

THE COURT: To count one?

JOSEPH J. MAGGIO: No, sir.

THE COURT: Has anyone told you what your sentence would be if you pleaded guilty in the case?

JOSEPH J. MAGGIO: No, sir.

THE COURT: Have you received any threats or promises of any kind other than what the United States Attorney and your lawyer, Mr. Walsh, just recited to me in order to get you to plead guilty in this lawsuit?

JOSEPH J. MAGGIO: No, sir.

(Emphasis supplied).

APPENDIX "B"

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office Of The Clerk

August 13, 1975

To All Counsel Of Record

No. 74-2629—United States of America vs.
Joseph J. Maggio

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

by /s/ *Clare F. Sachs*
Deputy Clerk

cc: Mr. Carl M. Walsh
Messrs. Ira Dement
D. Broward Segrest

No. T-285

Supreme Court, U. S.
FILED
DEC 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH J. MAGGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

Cases:	Page
Bryan v. *United States*, 492 F.2d 775, certiorari denied, 419 U.S. 1079	1, 3, 5, 8
Kennedy v. *United States*, 397 F.2d 16	6
McCarthy v. *United States*, 394 U.S. 459	6, 7
United States v. *Blake*, 488 F.2d 101	2
United States v. *Marcus*, 213 F.2d 230, certiorari denied, 348 U.S. 824	9
Williams v. *United States*, 192 F.2d 39	9
Statutes and rule:	
18 U.S.C. 371	2
18 U.S.C. 1341	2
Fed. R. Crim. P., Rule 11	1, 3, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-385

JOSEPH J. MAGGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court failed to comply both with Rule 11 of the Federal Rules of Criminal Procedure and with a mandate of the Fifth Circuit (in *Bryan* v. *United States*, 492 F. 2d 775, certiorari denied, 419 U.S. 1079) in accepting his guilty plea, and that his plea was made without full knowledge of the consequences.

An indictment filed in September 1972, in the United States District Court for the Middle District

of Alabama, charged petitioner and several co-defendants with conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and with seven different instances of mail fraud, in violation of 18 U.S.C. 1341. Following a jury trial, petitioner was convicted on all counts and sentenced to imprisonment for three years. Petitioner appealed and his conviction was reversed and remanded because certain records had been admitted without proper authentication (Pet. App. 2-3). See *United States* v. *Blake*, 488 F. 2d 101 (C.A. 5).

On the date set for retrial, petitioner moved to change his plea to guilty on one of the mail fraud counts (H. 1).[1] The district court, which had heard the earlier trial, ascertained that a bargain had been struck between the government and the defendant in which the change of plea was made in return for the dismissal of the remaining counts (H. 2). The court asked petitioner and his counsel whether they were aware of any other agreements; both replied, "No, sir" (H. 2). Upon further inquiry of petitioner, the court ascertained that he had received no threats or promises, other than the agreement to dismiss the seven counts, to induce him to plead guilty; that no one had stated what his sentence would be; and that he was aware of the maximum punishment that could be imposed (H. 2).

---

[1] "H." refers to the transcript of the May 13, 1974, Rule 11 hearing. "Tr." refers to the transcript of the hearing on petitioner's motion to withdraw his guilty plea. We are lodging both transcripts with the Clerk of this Court.

The court then accepted the plea and approved the government's motion to dismiss the remaining counts. Upon request of defense counsel, the court agreed to impose sentence later that day, so as to save petitioner and his lawyer the expense of another trip from their residences in Chicago, Illinois. (H. 2-3).

At the sentencing hearing government counsel made no statements. Defense counsel urged the court to place petitioner on probation. After petitioner stated that he had nothing to add to his attorney's remarks, the court sentenced him to imprisonment for two years (H. 3).

A week later petitioner filed with the sentencing court a motion to withdraw his guilty plea, alleging that the plea was not knowingly made and that the court had failed to comply with the requirements of Fed. R. Crim. P. 11, and with the procedures adopted by the Fifth Circuit a month earlier in *Bryan* v. *United States, supra* (Pet. App. 8). At a hearing on the motion at which petitioner, his counsel (Mr. Walsh), and government counsel testified, the evidence showed that during the initial conversations between Walsh and Assistant United States Attorney D. Broward Segrest regarding the possibility of a plea bargain, the latter had agreed, in exchange for a plea of guilty on one count, to dismiss the seven remaining counts and to recommend a sentence of probation if the court would allow him to make a recommendation. Segrest further indicated, however, that the court's policy was neither to ask for nor to

accept sentence recommendations from the government. Segrest stated that if he informed the probation office that the government would recommend probation, this suggestion possibly would be included in the presentence report to the judge (Tr. 60-65).

Five days before the trial date petitioner, after being informed of the negotiations between his counsel and the prosecutor, told his counsel that he would plead guilty only if Segrest were allowed to make a probation recommendation in open court (Tr. 20-21). Walsh conveyed this to Segrest, who requested the judge to make an exception in this case and accept a recommendation as to sentence. The judge refused (Tr. 8-9).

Segrest so informed Walsh, who relayed the information to petitioner. Petitioner responded that a trial would be necessary, but the following day, without further consultation with his counsel, he changed his mind. Petitioner stated that his decision was prompted by the prosecutor's cordial attitude and the feeling that if he received a three-year sentence upon conviction on eight counts, he would get a much lighter sentence, perhaps up to four months' imprisonment, for only one count (Tr. 28, 34-35, 37-38, 50-51).

After petitioner's guilty plea had been entered, but before he was sentenced, Segrest delivered a telegram to the district judge from an Assistant United States Attorney in Chicago, recommending probation because petitioner had provided assistance to the government which had resulted in a number of convic-

tions. The court told Segrest that it would not accept the telegram or place any reliance upon it at that time, and attempted to verify its message. After he left the judge's chambers, Segrest saw petitioner and made a comment to the effect that "things look good" (Tr. 28, 70). Petitioner said this reinforced his belief that he would receive lenient treatment.

After the hearing, the district court denied relief;[2] the court of appeals affirmed (Pet. App. A; 514 F. 2d 80).

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[2] The district court made the following findings and conclusions (Tr. 107-111):

a. The parties had not bargained for a recommendation by the government of a probated sentence in exchange for the guilty plea.

b. Petitioner's expectation of probation was the product of his own mental processes and not the result of any representations by his counsel or the prosecutor.

c. The plea-taking procedures were not in violation of Rule 11 since the court addressed petitioner personally and did ascertain that the plea was voluntarily made with an understanding of the charge and the consequences of the plea.

d. Petitioner in fact knew the nature of the charges and the elements of the offense by virtue of the earlier trial.

e. The factual basis requirement of Rule 11 was satisfied by examining the matter contained in the presentence report and by the fact that the court had presided at petitioner's first trial, where the testimony adduced was sufficient to convict him on all eight counts.

f. The noncompliance with *Bryan*, by failing to place petitioner under oath while questioning him before accepting the guilty plea, did not constitute a basis for setting the plea aside.

1. Petitioner contends that the district court failed to comply with Rule 11 in accepting his plea. His argument is essentially that the court did not determine that petitioner knew the nature of the charge because there was no discussion of the elements of the offense before the plea was accepted. This Court, in *McCarthy* v. *United States*, 394 U.S. 459, ruled that district judges accepting guilty pleas must follow the Rule and that noncompliance would require vacation of a guilty plea. The Court, however, did not establish any precise formula for a Rule 11 inquiry, but stated that "[m]atters of reality, and not mere ritual, should be controlling." *McCarthy*, *supra*, 394 U.S. at 467-468, n. 20 (quoting from *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C.A. 6)).

As the court of appeals held, the record here shows that the district court addressed petitioner personally and made the required determinations that the plea had been made voluntarily with the understanding of the nature of the charge and the consequences of the plea (Pet. App. 6, 10-12). The district judge, who had presided at petitioner's first trial, was not required by *McCarthy* to follow a "ritualistic procedure" (Pet. App. 12) to ascertain petitioner's knowledge of the elements of the offense or to determine the existence of a factual basis for the plea. The petitioner had been present and represented by the same counsel at the previous trial. There, all the government's evidence was presented on the charge upon which petitioner entered a guilty plea (as well as the seven additional counts).

When petitioner told the court that he concurred in counsel's motion to withdraw his plea of not guilty and to plead guilty to count one, the limited inquiry, in the context of this situation, satisfied the requirements of *McCarthy* and of Rule 11.[3] As the court of appeals concluded (Pet. App. 12):

> At the plea taking session the district judge had personal knowledge of the previous trial, [petitioner's] presence at that trial, and the jury's conclusion that [petitioner] was guilty of the count to which the plea was directed. Under such a circumstance, the district court was justified in determining that [petitioner] understood the nature of the charge, without going through a ritualistic procedure that is necessary in the average case.
>
> The same circumstances fulfilled the requirement that the court "be satisfied that there is a factual basis for the plea," which is another requirement of Rule 11. *See, e.g.*, Jiminez v. United States, 487 F.2d 212 (5th Cir. 1973), cert. denied, 416 U.S. 916, 94 S.Ct. 1623, 40 L.Ed.2d 118 (1974).

2. Petitioner's remaining claims are also without merit. His contention that the court of appeals impermissibly excused the district court's failure to comply with plea-taking rules recently set forth by

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[3] As petitioner indicates (Pet. 2-3), Rule 11 has been amended so that in the future district judges, when addressing defendants seeking to plead guilty, will be required specifically to inform them of the nature of the charge to which the plea is offered. Rule 11(c)(1). The issue raised here accordingly is not important for the future.

the Fifth Circuit in the exercise of its supervisory powers presents no issue warranting review by this Court. As the court of appeals observed, petitioner was not prejudiced by the district court's failure strictly to comply with those procedures because they were designed principally to meet a problem not presented in petitioner's case (Pet. App. 22-23):

> We see no prejudice requiring reversal, however, from the district court's failure to comply fully with the *Bryan* mandate. The *Bryan* requirement that a defendant be placed under oath was to preclude collateral attacks on a guilty plea by a defendant asserting that his representations to the court when he entered the plea were fabricated. Here the facts uncovered at the subsequent hearing on [petitioner's] motion to vacate his plea did not contradict or discredit his statements made at the time he entered his plea. On the contrary those facts demonstrated the the agreement disclosed to the court was the only agreement and that it was fully consummated by the Government. While the district court did not state that plea agreements were acceptable, it did inquire into the existence of any plea agreement. [Petitioner] then accurately apprised the court of the existence and terms of the only such agreement.[4]

[4] Petitioner's statement that he could not have been aware of *Bryan* at the time his plea was entered "because it had not yet been published" (Pet. 14) is inaccurate. The opinion in *Bryan*, filed on April 4, 1974, appeared in the April 29, 1974, issue of the Federal Reporter, Second Series, advance sheets. Petitioner's plea was not entered until May 13, 1974.

Petitioner contends finally that he did not understand the consequences of his plea because he expected that the sentence actually imposed would not exceed four months' imprisonment. But petitioner never repudiated his statement made to the district court at the time the plea was entered, *i.e.*, that he was aware of the maximum penalty and had not been promised a specific sentence by "anyone" in exchange for his plea. The prison term imposed after the plea was one-third less than that ordered after the jury trial. That this reduction did not meet petitioner's expectations did not make his plea any less knowing and voluntary. It has long been held, as the court of appeals recognized, that disappointment in the sentence imposed where the basis for defendant's disappointment is a subjective hope "unsupported by any promises from the Government or indications from the court, is insufficient to invalidate a guilty plea as unknowing or involuntary" (Pet. App. 13). See cases cited at Pet. App. 14; *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Williams* v. *United States*, 192 F. 2d 39 (C.A. 5). Here both the government and the court were scrupulous in avoiding any promise or indication as to what the sentence would be.[5]

[5] The comment made to petitioner by Assistant United States Attorney Segrest—that "things look good"—could not have affected the voluntariness of petitioner's guilty plea, since the comment was made after the plea was accepted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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